(15)

Office - Supreme Court, U. S.
FILED
MAR 11 1944
CHARLES ELMORE CROPLEY
CLERK

No. 685

In the Supreme Court of the United States

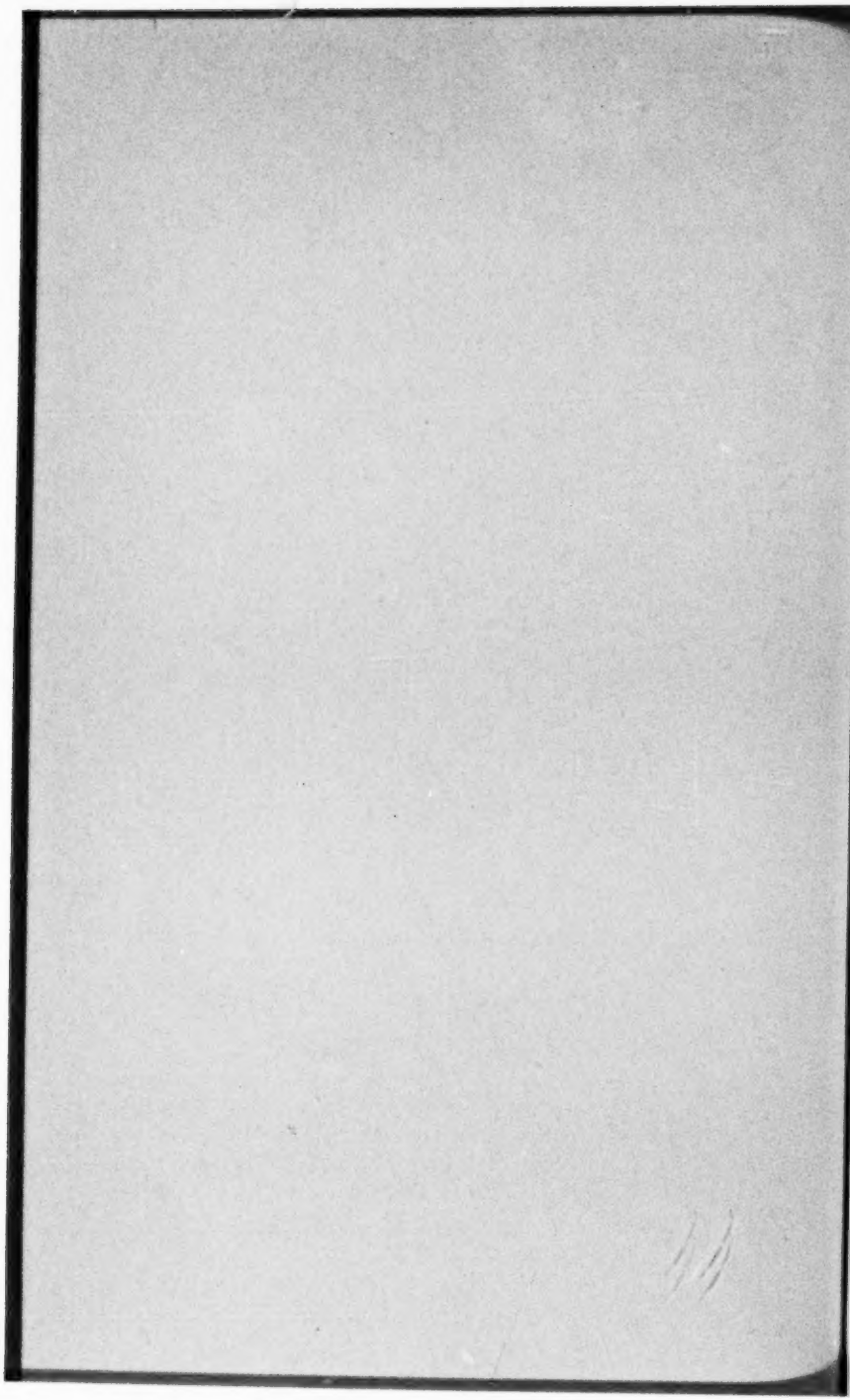
OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

MAX HARRY BLOCK, AN INDIVIDUAL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BLOCK'S SHOE STORES

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI



INDEX

	Page
Opinion below	1
Statement	1
Question presented	3
Reasons for granting the writ	5
Conclusion	18

CITATIONS

Allesandro v. C. F. Smith Co., 136 F.(2d) 75	7, 11
Burnet v. Chicago Portrait Co., 285 U. S. 1	7
Consolidated Timber Co. v. Womack, 132 F.(2d) 101	17
Davies Warehouse Co. v. Bowles, 88 L. Ed. Adv. Op., 379	7
Duncan v. Montgomery Ward & Co., 42 F. Supp. 879	7
Fleming v. American Stores Co., 42 F. Supp. 511	8
Hanson v. Lagerstrom, 133 F.(2d) 120	17
Higgins v. Carr Brothers Co., 317 U. S. 572	15
Jehs v. Singer Sewing Machine Co., 5 Labor Cases 62,255	7
Kirschbaum Co. v. Walling, 316 U. S. 517	4, 15
McLeod v. Threlkeld, 319 U. S. 491	17
Sanford's Estate v. Commissioner of Int. Rev., 308 U. S. 39	7
United States v. American Trucking Associations, 310 U. S. 534	16
Veazey Drug Co. v. Fleming, 42 F. Supp. 689	7
Walling v. A. H. Phillips, 50 F. Supp. 749	7
Walling v. American Stores Co., 133 F.(2d) 849	7, 8
Walling v. Goldblatt Bros., 128 F.(2d) 778	10
Walling v. Jacksonville Paper Co., 317 U. S. 564	4, 9, 13, 15
Walling v. L. Wiemann Co., 138 F.(2d) 602	6, 10, 16
Walling v. Rocklin, 132 F.(2d) 3	17
White v. Jacobs Pharmacy Co., 47 F. Supp. 298	7, 10, 16
Statute:	
Fair Labor Standards Act of 1938:	
Sec. 3(j)	2
Sec. 12	15
Sec. 13(a) (1)	13
Sec. 13(a) (2)	3
Miscellaneous:	
Bureau of the Census	15
House Report, No. 2738	14
Interpretative Bulletin No. 6 (December, 1938)	5
Par. 18	6
Par. 20	16

	Page
Interpretative Bulletin No. 6 (Revised June, 1941)	5
Par. 36	16
Par. 37	6
Par. 40	17
Joint Hearings, Senate Committee on Education and Labor, House Committee on Labor	12
N. R. A. Codes of Fair Competition	15
Senate Committee Report, No. 884	13
82 Cong. Rec. 1399	13
82 Cong. Rec. 7281	13
82 Cong. Rec. 7436	14
82 Cong. Rec. 7437	14
82 Cong. Rec. 7438	14
83 Cong. Rec. 9158	14
83 Cong. Rec. 9257	14

No. 685

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

MAX HARRY BLOCK, AN INDIVIDUAL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BLOCK'S SHOE STORES

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Max Harry Block, an individual, doing business under the firm name and style of Block's Shoe Stores, respectfully submits this brief in opposition to the petition for writ of certiorari.

OPINION BELOW

The opinion of the circuit court of appeals (R. 471) is reported in 139 F.(2d) 268.

STATEMENT

Respondent's business consists solely of selling merchandise at retail in nineteen stores, fourteen of which are in Washington, three in Oregon, and two in Idaho. Three of the stores are located in

Seattle where also is located the warehouse and central office (Ex. 1; R. 290).[1] Respondent operates his business as a single establishment (R. 424). Some merchandise is purchased locally, but the major portion is purchased from eastern suppliers; some merchandise is shipped directly to the stores, but the major portion is received in the warehouse and redistributed to the stores (R. 472).[2] The petition (p. 3) states that the warehouse and central office are maintained "entirely separate from the retail stores." The circuit court of appeals on the contrary found in conformity with the holding of the district court that the services involved in the warehouse and central

[1] The so-called warehouse is a room of approximately 3400 square feet, adjoining which is the central office (R. 353, 352, 411). These are located on the third floor of an office building in the central retail district of Seattle (R. 41, 172, 173, Ex. 4; R. 306). This building is immediately adjacent to the building in which is located one of the Seattle stores (R. 40, 145, 172). An average of approximately ten employees are employed in the warehouse and central office, two of whom are receiving and shipping clerks employed in the warehouse (R. 161) and the remainder are executive, administrative, clerical, bookkeeping, and maintenance employees employed in the central office (R. 239, 278).

[2] Although it is claimed by petitioner that the employees in the warehouse are engaged in interstate commerce, it is not claimed that respondent or any of his employees are engaged in the *actual* production or manufacture of goods for commerce within the meaning of Section 3(j) of the Fair Labor Standards Act of 1938, herein called the "Act." It is likewise not claimed that the greater part of the retail selling of respondent is other than in intrastate commerce.

office "were a mere incident to and an integral part of the operation of each store in the group" (R. 473).

QUESTION PRESENTED

The petition (p. 2) states the question presented as being whether the employees employed in the "central warehouse"[3] are engaged in a "retail or service establishment" and therefore exempt from the wage and hour provisions of the Act.

The district court held that the employees employed in both the warehouse and central office were (1) within the exemption of Section 13(a)(2) of the Act, herein referred to as the retail exemption, and (2) were not engaged in interstate commerce and therefore not within the coverage of the Act (R. 225, 226). The district court held that the work performed by these employees was "incidental to and in furtherance" of respondent's retail business (R. 226).

The circuit court of appeals affirmed the decree of the district court dismissing petitioner's complaint on respondent's motion made at the close of the petitioner's evidence (R. 227, 465). The circuit court of appeals held that these employees were within the retail exemption and neither ap-

[3] This would appear to eliminate the employees in the central office from the question presented.

proved nor disapproved the holding of the district court that these employees were not within the coverage of the Act, except as to those engaged in distributing merchandise to the Oregon and Idaho stores.[4] Should the petition be granted and the decision below be reversed on the question presented, the case should be returned to the circuit court of appeals for the purpose of disposing of the question of coverage.

The question as presented in the petition is much broader than the decision below. It was not held that all employees in all such warehouses or central offices of a chain store system are within the retail exemption. The decision below was properly limited to the facts of this particular case and to the joint finding of both courts below that the services performed in the warehouse and likewise in the central office were "incidental to and in furtherance" of respondent's

---

[4] The circuit court of appeals after referring to the finding of the district court that the employees were not engaged in commerce, stated: "However, for purposes of decision we assume the contrary, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 519. Certainly those persons employed in and about the distribution of merchandise to the Oregon and Idaho stores were so engaged" (R. 472).

retail business and "a mere incident to and integral part of the operation of each store."

REASONS FOR GRANTING THE WRIT

First: The petition (p. 6) asserts that the decision of the circuit court of appeals interpreting the retail exemption raises a question of importance in the administration of the Act.

Any such question is self-imposed and has not resulted from any judicial uncertainty. Reduced to its simplest form the result of petitioner's position must be that the mere physical separation of the warehouse and central office from any one of the stores is sufficient to exclude application of the retail exemption to those employed in such warehouse and central office (See p. 16 infra). In the decision below it is stated: "The mere physical separation of appellee's warehouse from the stores themselves can hardly be regarded as a controlling factor" (R. 473).

It is important to note the difference between Interpretative Bulletin No. 6 (Revised June, 1941) and the original issue thereof in December, 1938. In the revision it is stated that the retail exemption does not apply to warehouses and central executive offices which distribute to or serve stores as these are "physically separated establishments which do not have the characteristics of

retail or service establishments."[5] The revision was issued not earlier than twenty days after the commencement of this action (R. 26) and was likewise issued after the commencement of the action in *Walling v. L. Wiemann Co.*, 138 F.(2d) 602 (C.C.A., 7)[6] and this is likewise apparently

---

[5] In paragraph 18 of Interpretative Bulletin No. 6 (December, 1938) it is stated:

> "The question has been raised as to the scope of the term 'establishment' in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption."

In paragraph 37 of Interpretative Bulletin No. 6 (Revised June, 1941) there has been added the following:

> "The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants, or other non-retail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments."

[6] In reference to this the court in that case stated (p. 606):

> "It is unnecessary for us to assert or deny the Administrator's legal right to promulgate at any time an interpretation of any statute affecting his administrative duties. For the purpose of this argument we assume the existence of such right, if it is reasonably and fairly exercised. However, it is unfortunate that it was thought expedient and necessary to issue the revised bulletin within such a short time after this action was filed. That fact should be considered with all other pertinent evidence in determining the intention of Congress in enacting the statute in 1938, in view of the

true of the actions instituted in *Jehs v. Singer Sewing Machine Co.*, 5 Labor Cases 62,255 (D.C. Okla.), *Veazey Drug Co. v. Fleming*, 42 F. Supp. 689 (D.C. Okla.), and *Duncan v. Montgomery Ward & Co.*, 42 F. Supp. 879 (D.C. Tex.). In these cases as well as in *White v. Jacobs Pharmacy Co.*, 47 F. Supp. 298 (D.C. Ga.) and *Allesandro v. C. F. Smith Co.*, 136 F.(2d) 75 (C.C.A., 6) the position of the petitioner was not sustained.[7]

Inasmuch as the administrative interpretation of the retail exemption in Interpretative Bulletin No. 6 (Revised June, 1941) was actually challenged even before it was made, the decision in *Davies Warehouse Co. v. Bowles*, 88 L. Ed. Adv. Op. 379, 386 is all the more applicable. This court there refused to uphold an administrative ruling "no sooner made than challenged."[8]

---

fact that the Administrator, in December of that year, issued the original Interpretative Bulletin No. 6 which was in force at the time this complaint was filed."

[7] The only reported case to the contrary is *Walling v. A. H. Phillips*, 50 F. Supp. 749 (D. C. Mass.). No similar finding was made in that case as here. If such finding could have been made then the court erroneously followed the decision in *Walling v. American Stores Co.*, 133 F.(2d) 840 (C.C.A., 3), which latter decision does not support the position of the petitioner.

[8] The administrative interpretations of the retail exemption in Interpretative Bulletin No. 6 (Revised June, 1941) are not consistent and are likewise ambiguous and therefore of little value. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16; *Sanford's Estate v. Commissioner of Int. Rev.*, 308 U. S. 39, 52 (See p. 16, *infra*).

It is submitted that there is not here presented an unsettled question of importance such as to warrant the granting of the petition.

Second: The petition (p. 9) asserts that a conflict exists between the decision below and the decision in *Walling v. American Stores Co.*, 133 F.(2d) 840 (C.C.A., 3).

Such conflict does not in fact exist. In the *American Stores* case (p. 841) it is stated that with the exception of certain enumerated exclusions the question for decision is whether "the sum total of the activity of the American Stores Company constitutes a 'retail establishment' so as to exempt the entire enterprise from the mandate of the statute."[9] It thus appears that except for the enumerated exclusions the court in that case was not considering the retail exemption as applied to any particular warehouse, but was dealing with the sole contention that the *entire enterprise* was within the retail exemption. Therefore, assuming that some of the warehouses involved in

[9] In the district court, *Fleming v. American Stores Co.*, 42 F. Supp. 511, 513 (D. C. Pa.), it is stated that the defendant's contention was "That the entire business of the American Stores Company of Delaware, and its subsidiaries, including the 2300 stores, warehouses, bakeries, manufacturing and processing operations, main offices, printing and multigraphing plant, transportation facilities, and repair and machine shops, constitutes *a single 'retail establishment'* whose primary business is selling at retail in intrastate commerce, and as such is exempt under Section 13(a)(2)."

that case did no "manufacturing or processing" as stated in the petition (p. 10), no conflict results.

The statement in the petition (p. 10) that some of the warehouses involved in the *American Stores* case performed precisely the same functions as the "warehouse" involved in this case is without support in the record. This is, of course, a question of fact and each case depends on the special facts pertaining to the particular business. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564. The decision below found that the services involved in the warehouse and central office in this case "were a mere incident to and an integral part of the operation of each store in the group." No such finding was or could have been properly made in the *American Stores* case.

At the trial of this action the attorney for the petitioner stated: "Our evidence will show, or at least will be directed to show, that the office and warehouse is not, itself, a retail establishment, and does not perform the functions of a retail establishment; that it performs a separate function of wholesale distribution or intermediary distribution which is not the function of the retail establishment" (R. 257). No evidence, however, was offered as stated, but on the contrary the evidence is conclusive in support of the joint findings of both courts below that all of the functions performed in the warehouse and central office were

solely incidental to respondent's retail business (R. 416) and that such selling at retail could not be carried on without these functions being performed (R. 422).

The *American Stores* case has been considered by other courts having before them substantially the same factual situation as here and the decision in that case has been held inapplicable.[10]

---

[10] In *White v. Jacobs Pharmacy Co.*, 47 F. Supp. 298 (D. C. Ga.), referring to the decision in the district court, it is stated (p. 301):

> "The American Stores Company case dealt with a parent organization and its subsidiaries having business ramifications in several states and as to which it was sought to relate each activity whether of manufacture or wholesale sales to the ultimate of retail sales. In the present case the whole business of the defendant is retail sales and such participation in commerce as is shown is purely incidental to its retail sales. If the defendant was engaged in any other business or made any substantial wholesale sales to other parties the exemption claimed would be unavailable, for it would not then be a retail establishment."

In *Walling v. L. Wiemann Co.*, 138 F.(2d) 602 (C.C.A., 7) the court did not follow its dictum in *Walling v. Goldblatt Bros.*, 128 F.(2d) 778, 783 and stated (pp. 605, 607) with reference to the American Stores Company:

> "* * * it was more than a retail establishment, for it was manufacturer, processor, transporter and distributor, and for that reason the court held that the warehouses were not a mere adjunct of the company's retail establishment. We think the facts in that case are in no way analogous to the facts here presented.
>
> "* * *.
>
> "We are unable to perceive the source of appellant's

Third: The petition (p. 11) asserts that the decision below is erroneous.

The argument that the legislative history of the retail exemption excludes its application as made by the circuit court of appeals is believed to be without merit. On the contrary, the legislative history is believed to demonstrate conclusively

---

authority for ruling that the word 'establishment,' as used in the Act, refers to a physical place of business and does not refer to a 'business or enterprise as applied to multi-unit companies,' dealing wholly in intrastate business, and does not apply to appellee's warehouse and central executive offices, although the District Court found that such warehouse and offices constitute component and necessary parts of appellee's unitary business. The District Court found nothing in the Act, nor do we, to indicate such intention on the part of Congress, nor any language therein which would permit of such construction. * * * where the meaning is definite and clear, and the language is not fairly subject to more than one interpretation, it cannot be altered in any manner except by Congressional action, certainly not by administrative or judicial legislation."

In *Allesandro v. C. F. Smith Co.*, 136 F.(2d) 75 (C.C.A., 6), the court stated (pp. 77, 78) with reference to the American Stores Company:

"It was, the court said [133 F.(2d) 844] 'a multi-state business structure engaged in manufacturing and processing food products, warehousing and distribution of food items' and so not comparable to retail establishments sought to be exempted by Congressional grace.

"* * *. The sole business of the Smith Company is retailing and its warehousing of merchandise without other purpose than to provide for necessary and economical distribution of merchandise to its stores for sale at retail."

that Congress intended that the retail exemption should apply to the business of selling at retail in intrastate commerce and that there is not the remotest indication that it was of moment whether all of the activities incident thereto were conducted in a single location or building or whether the same were spread among several locations or buildings.

Justice Jackson, then an Assistant Attorney General, analyzed the original bills in the first proceedings at the Joint Hearings[11] and stated (p. 35): "It was not intended by this bill to apply generally to retailers or to apply to the service trades * * * and small business generally * * *. * * * generally speaking the policy of the bill is not to include the service trades and small business and the retailing enterprises. * * *. As a practical proposition the bill does not affect the retail trade."[12] Justice Black, then a member of

---

[11] Joint Hearings, Senate Committee on Education and Labor, House Committee on Labor, 75th Cong., 1st Sess., Part I, on S. 2475 and H.R. 7200.

[12] What he meant by the reference to "small business generally" is made clear by his further statement: "In fact, there is in it a provision * * * for the exemption of businesses which have a number of employees below some certain figure which the Congress of course may fix."

the Senate, submitted the Senate Committee Report.[13]

The bill as passed by the Senate was referred to the House. In a debate on a petition to discharge the Committee on Rules, a member of that Committee stated: "Employees in retail establishments, including the big department and chain stores, as well as the small independent ones, are expressly exempted from the provisions of the bill," 82 Cong. Rec., 1399. On the bill coming before the House, Mrs. Norton, Chairwoman of the Committee on Labor, stated that the bill "absolutely exempts retailing," 82 Cong. Rec., 7281. During debate and due to the interstate movement of merchandise from suppliers, the question of the sufficiency of the exemption pertaining to retailing was discussed and despite Mrs. Norton's statement that "It has been stated time and time again that local retailing is exempted from the

---

[13] Senate Committee Report, Report No. 884, 75th Cong., 1st Sess. The bill as there reported contained the present exemption found in Section 13(a)(1) of "persons employed in a * * * local retailing capacity" but did not contain the present retail exemption, Section 13(a)(2). The report nevertheless contains the following (p. 5): "* * * it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States," thus indicating that this was being accomplished by Section 13(a)(1). See in this connection the statement in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571.

bill," 82 Cong. Rec., 7436, 7437, a clarifying amendment exempting "any retail industry, the greater part of whose sales is in intrastate commerce" was submitted and passed. 82 Cong. Rec., 7437, 7438.[14] The resulting Conference Report[15] contained the present retail exemption, Section 13(a)(2), and as so reported the statute was enacted.[16]

The petition (p. 11) further states that it was not the purpose of Congress to exempt employees engaged in chain store warehouses that in fact performed the function of a wholesaler. Assuming the correctness of this statement it has no

---

[14] Mr. Celler in reference to his amendment stated: "You have voted down amendments which would have made clear beyond peradventure of a doubt that retailing is exempted. The courts will look to the debates in this House for what is meant by these words. * * *. If you want to eliminate retailing, you should say so in clear-cut language, and this amendment which I offer indicates in the clearest way that retailing is exempted. * * *. * * * it is not the intention to include retailing—why not say so? My amendment actually says that." 82 Cong. Rec., 7438. Another member stated that the amendment would "expressly exempt retailing." 82 Cong. Rec., 7438.

[15] House Report No. 2738, 75th Cong., 3rd Sess., Senate Report 83 Cong. Rec., 9158, 75th Cong., 3rd Sess.

[16] In reporting to the House the result of the Conference Report, Mrs. Norton stated: "Every amendment which was adopted on the floor to the House bill we have retained." 83 Cong. Rec., 9257. It is believed clear that no one considered that the change in the phraseology of Mr. Celler's amendment adopted on the floor of the House in any way affected the exclusion of the "retail industry."

application here (p. 9, *supra*). There is an entire absence of testimony to support the assertion that the warehouse here performed the function of a wholesaler. In the absence of such testimony, the argument, if pertinent, is wholly without foundation. *Higgins v. Carr Brothers Co.*, 317 U. S. 572.

It is submitted that petitioner's extensive reference to sundry N.R.A. Codes of Fair Competition, the practices of the Bureau of the Census, the effect of the word "establishment" in Section 12 of the Act and the treatment of chain stores in various fields such as taxation, fire prevention, child labor and hours of employment (none of the factual material referred to was introduced in evidence) are of no assistance in determining the application of the retail exemption and are not in any manner persuasive of the meaning intended by Congress. The wide variety of purposes to be accomplished by such legislation, classification and regulation makes the same wholly inappropriate as a guide for either determining the intention of Congress or the meaning of the language used.[17]

The petition (p. 14) further states that were the matter doubtful, the consistent administrative interpretation would be determinative. The deci-

---

[17] *Kirschbaum v. Walling*, 316 U. S. 517, 521; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564.

sion in *United States v. American Trucking Associations,* 310 U. S. 534, 539, cited as authority for this statement, holds no more than that certain administrative interpretations are entitled to "great weight."

It is believed that the administrative interpretations in reference to related problems are both ambiguous and contradictory.[18] In determining the application of the retail exemption to a large department store, the Administrator now states that if all departments are operated as a single store, the enterprise taken as a whole, will ordinarily be considered to be the establishment.[19]

---

[18] See p. 7, *supra.*

[19] In paragraph 20 of Interpretative Bulletin No. 6 (December, 1938) it was stated in reference to such stores: "* * * since all departments are operated under one roof, the enterprise, taken as a whole, will ordinarily be considered to be the establishment." The requirement of being *under one roof* has apparently been eliminated from paragraph 36 of Interpretative Bulletin No. 6 (Revised June, 1941) dealing with this subject. If this requirement is eliminated the interpretation is not consistent with that sought to be here applied, and if not eliminated physical location alone is the basis for the position here taken. Nothing is found within the terms of the statute which justifies a determination of the question of whether an enterprise is or is not a retail establishment predicated solely upon the physical location of its component parts. It is the nature of the business rather than the location or locations in which it is conducted which determines coverage or exemption under the statute. *White v. Jacobs Pharmacy Co.,* 47 F. Supp. 298, 301 (D. C. Ga.); *Walling v. L. Wiemann Co.,* 138 F.(2d) 602, 605 (C.C.A., 7).

If this be true, why should not the same apply to respondent's business?

The rationale of paragraph 40 of Interpretative Bulletin No. 6 (Revised June, 1941) is contrary to the position here taken by the petitioner.[20] The decision below conforms to the underlying theory of the interpretation announced in this paragraph and with the decisions dealing with this subject.[21] The combined functions of the employees working

---

[20] This paragraph relates to situations where the principal business being dealt with is not within any exemption and the question is whether an adjunct may be within an exemption and provides: "* * * in many cases, section 13(a)(2) does not apply since the facilities furnished serve merely to facilitate or make possible the continued operation of the principal business of the company. In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of the facilities is an integral part of the principal operations." In reference to examples more specifically detailed therein, such as cook houses, it is stated that they "may not be considered as separate retail or service establishments for purposes of the exemption."

[21] In *Consolidated Timber Co. v. Womack*, 132 F.(2d) 101, 107 C.C.A., 9) a cook house operated in connection with logging operations was held to be "a 'necessary' part of the * * * production of goods for commerce." It was held that the cook house, which likewise served the public, was not a separate or independent establishment entitled to exemption under Section 13(a)(2), but actually a part of the employer's facilities—a link in the chain—whereby it operated its business and a means whereby to accomplish the purpose of its existence. See *Hanson v. Lagerstrom*, 133 F.(2d) 120 (C.C.A., 8); *McLeod v. Threlkeld*, 319 U. S. 491, 493; *Walling v. Rocklin*, 132 F.(2d) 3 (C.C.A., 8).

in the warehouse and central office and those working in the nineteen stores or outlets are necessary to the conduct of respondent's business of selling at retail and one without the other could serve no function. If consistency is to be obtained these decisions lead inescapably to the conclusion that the retail exemption is applicable not only to the employees in the nineteen stores or outlets, but also to the employees working in the warehouse and central office.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Counsel for Respondent.